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IN THE

Supreme Court of the United States

October Term, 1951

No. 676

RAOUL BERGER, *Petitioner*

v.

J. HOWARD MCGRATH,
Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAOUL BERGER
Attorney Pro Se
Suite 1116 Ring Building
Washington, D. C.

ABE KRASH
Washington, D. C.
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered March 5, 1951, which affirmed an order of the United States District Court for the District of Columbia denying leave to intervene, and held that the attorney's lien of Petitioner is made invalid by the Trading with the Enemy Act.

Opinions Below

The District Court filed no written opinion. The opinion of the Court of Appeals (R. 24) is not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1), Title 28 U. S. C.

Question Presented

Whether §9(f) of the Trading with the Enemy Act invalidates the liens of attorneys who prosecute suits for recovery of property taken from American citizens under the Act.

Statement of the Case

Petitioner (Intervener in the District Court) was retained in October, 1948, by Madeleine duPont Ruoff (Plaintiff), an American citizen and resident, to institute suit for the recovery of property vested from her by Respondent (Defendant) under the alleged authority of the Trading with the Enemy Act. The contract of employment made the fee for legal services contingent upon recovery, provided that the fee was to be paid "only out of said recovery", and gave Petitioner "an attorney's lien upon said recovery as security for the payment of said fees." R. 21.

On the eve of pre-trial in August, 1950, Petitioner was discharged without cause by Plaintiff. Plaintiff stipulated in a compromise agreement, under which Petitioner consented to substitution of attorneys, that Petitioner had faithfully performed his contractual obligations,[1] that he was dismissed without cause, and that he is entitled to compensation in the event of recovery by Plaintiff. R. 13, 14.

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[1] Petitioner filed suit on behalf of Plaintiff on November 15, 1948, R. 1 and in the interval prior to his discharge in August, 1950, filed, among other things, a petition for a writ of mandamus in this Court, *Ruoff* v. *McLaughlin*, October Term, 1949, No. 438, Misc., which was denied, 339 U. S. 930.

Plaintiff further stipulated that Petitioner is "entitled to intervene * * * for the protection of his interest", R. 14, and that she would "in no way * * * oppose" a motion by Petitioner to intervene. R. 15. Plaintiff also "ratified and confirmed" Petitioner's charging and retaining liens, "it being the intention of the parties hereto to reinforce, not to supersede all liens now held" by Petitioner. R. 14.

On November 29, 1950, Petitioner filed a Complaint asking that his "interests in the property in suit be secured and protected by this [District] Court." R. 18. Simultaneously, Petitioner filed a Motion to Intervene as of right under Rule 24(a)(2) and (3) of the Federal Rules of Civil Procedure. R. 15.[2] Respondent opposed intervention and recognition of Respondent's lien. On April 3, 1951, the District Court found that Petitioner had rendered valuable services to Plaintiff for which he had not been compensated, that Plaintiff discharged Peti-

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[2] Counsel have been permitted to intervene for the protection of their lien interest. *Friedman* v. *Harris*, 158 F. (2d) 187 (App. D. C.); *Kellogg* v. *Winchell*, 273 Fed. 745 (App. D. C.); cf. *Barnes* v. *Alexander*, 232 U. S. 117, 123. If judgment goes against Plaintiff there is no property to which Petitioner's lien can attach and his right to payment is irrevocably lost.

Since Petitioner's wrongful discharge, successor counsel has already been once displaced. Petitioner intervened to avoid having his labor of years at the mercy of successors whom he had no voice in selecting. As was said in *New York Phonograph Co.* v. *Edison Phonograph Co.*, 150 Fed. 233, 234 (C. C. S. D. N. Y.):

> "If the client should be so unfortunate as to place it [the litigation] in incompetent hands, there might never be any of the fruits which the original solicitor might produce, were the cause left in his hands, and thus, if eventually it should appear that the client could show no misconduct on the part of the solicitor, all remuneration for the labor of years would be wholly lost through the misconduct of the client. It is to guard against such iniquitous results that courts exercise the power of supervision over orders of substitution." See also *DuBois* v. *Mayor of New York*, 134 Fed. 570 (C. A. 2d).

tioner without misconduct on his part, and that Plaintiff had consented to intervention. R. 22. An order was entered which granted intervention so limited as to lead the court below to say: "In effect the District Court denied leave to intervene." R. 25. The Court of Appeals affirmed on the narrow ground that the "alleged" lien is "invalid" by virtue of §9(f) of the Trading with the Enemy Act, 50 U. S. C. App. 9(f).

Statute Involved

Section 9(f) of the Trading with the Enemy Act, 40 Stat. 419, as amended, 50 U. S. C. App. §9(f) provides:

> "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

Reasons for Granting the Writ

The decision below is of first impression in the Court of Appeals. But the question raised is of large importance in the administration of the Act so that review by this Court is, we believe, plainly warranted.

It is common knowledge that the bulk of the claims for recovery of property seized from American citizens by the Respondent are prosecuted by means of contingent retainers,[2] the fees being limited by §20 of the Act,

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[2] "Persons having claims against the United States that must be collected through proceedings in the court of claims [or in suits against Departments in the District of Columbia] are practically compelled, in the majority of cases, to employ attorneys and contract with them for fees contingent upon success." *Roberts* v. *Consaul*, 24 App. D. C. 551, 559.

Without contingent retainers

> "poor litigant[s] * * * would find it impossible to maintain their suits, however meritorious * * *" *Jacobs* v. *North Louisiana & Gulf R. Co.*, 69 F. Supp. 5, 7 (W. D. La.)

roughly speaking, to 10% of the recovery. Couple with this 10% fee limitation the fact that many claims involve small amounts, that many claimants are non-residents, and that a client has an absolute right to discharge his attorney[4] and it becomes readily apparent that the destruction of the attorney's security for services rendered must further increase the difficulty of securing contingent representation to recover the vested property.

It is unreasonable to conclude that Congress provided relief to American claimants with one hand and sought to bar the door to relief with the other by impeding the contingent representation which implements the remedy. It was

> "not the purpose of Congress in the passage of the Act to deprive an American citizen of his property rights or so to administer the Act as to cause him unnecessary financial loss." *Mayer* v. *Garvan*, 278 Fed. 27, 35 (C. A. 1st).

The purpose of the Act was to weaken the enemy, *United States* v. *Chemical Foundation*, 272 U. S. 1, 9, not to destroy the rights of American lawyers who gave their services to secure the relief granted by the Act. Such destruction impairs the relief granted to Claimants and is thus at war with a main purpose of the Act.

Argument

1) Section 9(f) was not designed to destroy attorney's liens. It is merely part of a scheme of exclusive administration of vested property which confines judicial relief

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A contingent fee agreement "permits the poor litigant to obtain competent legal service which he could not otherwise afford." 4 *Encyclopedia Social Sciences* 311, 312 (1931); see also *Baylor* v. *Bemiss*, 110 U. S. 42, 45; *Newman* v. *Freitas*, 129 Cal. 287, 292, 61 P. 907, 910.

[4] *United States* v. *McMurtry*, 24 F. (2d) 145, 146 (S. D. N. Y.); *Nolan* v. *Hemingway Bros. Interstate Trucking Co.*, 88 F. Supp. 111, 113 (S. D. N. Y.).

to a United States District Court in which suit is brought under §9(a) of the Act (hereafter the "9(a) court"). It was designed to insure that *no other court* would interfere with such administration. A glance at the structure of the Act will make this clear.

The Act furnishes a judicial remedy for recovery of vested property by suit under §9(a). Section 7(c) expressly provides that

> "The sole relief and *remedy* of any person * * * [seeking recovery of vested property] shall be that provided by the terms of this Act."

Thus by §7(c) the *remedy* was made exclusive. To provide an exclusive *forum*, i.e. the court in which suit for recovery is brought under §9(a), §9(f) declares

> "Except as herein provided, the money or other property conveyed * * * to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution or subject to any order or decree of any court."

"Attachment, garnishment, trustee process, or execution" (hereinafter "attachment and garnishment") are media of *obtaining* control over or possession of property.[5] Section 9(f) is given a rational meaning by confining it to *other* than "9(a) courts" which seek to obtain such possession or control by "attachment and garnishment".

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[5] Attachment and garnishment are means of bringing property within the jurisdiction or control of the court. *Cooper* v. *Reynolds*, 10 Wall. 308, 317; *Martin* v. *Wheatley*, 62 F. Supp. 104, 106 (W. D. Ark.); *Central Trust Co.* v. *Chattanooga R. & C. R. Co.*, 68 Fed. 685, 687 (C. C. Tenn.); cf. *Harris* v. *Balk*, 198 U. S. 215.

Trustee process, employed in some states in lieu of garnishment, is "simply a form of attachment". *Davis* v. *United States Bobbin and Shuttle Co.*, 118 Me. 285, 107 Atl. 865; 1 Bogert, *Trusts & Trustees* §37 (1951).

Execution is a process authorizing the seizure of property for the satisfaction of a judgment. *Lambert* v. *Powers*, 36 Iowa 18, 20; *Webber* v. *Harshbarger*, 5 Kan. App. 185, 47 Pac. 166, 167.

These terms do not apply to a "9(a) court" because the court in which suit is instituted under §9(a) thereby obtains control over the vested assets;[6] it has no need to reach for the property by "attachment or garnishment". As to the "9(a) court"—here the court below—the 9(f) prohibition is therefore useless, and does not advance the statutory scheme for insulating the administration and return of vested property from interference by unauthorized tribunals.

Under the rule *noscitur a sociis*,[7] the word "lien" must be given the connotation of the associated words. Hence the §9(f) "lien" like "attachment, garnishment, trustee process, or execution" is confined to the enforcement of a lien by some *other* court in order to obtain jurisdiction over the property in the hands of the Custodian. Enforcement of an attorney's lien by the "9(a) court" does not infringe upon the Congressional purpose to shield the vested property from *other* courts. Instead it advances the 9(a) remedy fashioned by Congress. We cannot therefore attribute to Congress an intention by 9(f) to destroy the lien of a lawyer who prosecutes the suit for recovery.[8]

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[6] Section 9(a) authorizes the "9(a) court", if a proper claimant establishes his interest, to "order the payment * * * or delivery to said claimant of the money or property so held by the Alien Property Custodian * * *." By §9(a) the Custodian is enjoined upon institution of the 9(a) suit to retain the money or property in his custody until final judgment is entered.

Nor would the Custodian have any occasion to apply for a writ of attachment. He secures possession of property through voluntary compliance with a vesting order. If the possessor refuses to comply, the Custodian may institute a proceeding under §17 to compel a turnover.

[7] *Neal* v. *Clark*, 95 U. S. 704, 708-709; *Patton* v. *United States*, 159 U. S. 500, 509.

[8] Judge Learned Hand declared that

"We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons,

2) The reliance by the court below on *La Mettrie* v. *James*, 6 F. (2d) 479 (App. D.C.), aff'd, *De La Mettrie* v. *James*, 272 U. S. 731, is misplaced. For the statement of the case we quote from the brief of Respondent in the court below (Appellee's Br. 27):

> "The suit in that case was brought [in a "9(a) court"] against the Custodian for payment of a debt out of *the vested property of the debtor.* Some *two years after the suit was brought,* a *New York court,* in supplementary proceedings, *appointed a receiver to take 'all the property,* debts, equitable interests, and things in action, effects, and estate, real and personal' of the debtor. The receiver moved to intervene in the suit and was denied leave under §9(f)." (Emphasis supplied throughout).

On review this Court held that the receiver was without standing because

> "the New York court had no jurisdiction over funds held by the Custodian." 272 U. S. at 733.[9]

Since the Act confers exclusive jurisdiction upon the "9(a) court", since that court had obtained jurisdiction, the state court was powerless to appoint a receiver to take control of the vested property. This was precisely the situation at which §9(f) was pointed. Here Petitioner did not seek to oust the "9(a) court" of jurisdiction; instead he applied to that court to safeguard his lien.

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actuated by such a purpose, would have dealt with it, if it had been presented to them at the time." *Borella* v. *Borden Co.*, 145 F. (2d) 63, 64-65 (C. A. 2d), aff'd 325 U. S. 679.

[9] In effect the case reflects the rule that

"the court whether federal or state, which first takes possession of a res, withdraws the property from the reach of the other." *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 135.

3) In addition to making exclusive the forum in which suits for recovery may be maintained, §9(f) is also designed to prevent assertion *against the Custodian* of interests in the property other than those enumerated in §9(a). The Act, of course, was not designed to disable a claimant from contracting an obligation to counsel retained to recover the vested property. Cf. §20. Petitioner has levelled no demands against the Custodian; he has not sought to make the vested property "liable" for his lien. Instead, he sought to enter the suit

> "as party plaintiff against plaintiff herein to assert with her and on her behalf her claim against defendant herein * * *." R. 16.

Patently petitioner sought to assert no lien against the Custodian or the property in his hands,[10] but only to "question the merits of a * * * defense," as any intervener may do. 4 Moore, *Fed. Prac.* 116-117 (2d ed., 1950). If plaintiff recovers, *she* must satisfy petitioner's lien. If she fails, the lien is gone. Section 9(f) was not aimed at such liens, but at liens asserted against the Custodian.

4) In declaring that the "alleged" lien is "invalid", the court below went farther than the Courts have gone under the parallel Anti-Assignment Act, Rev. Stat. §3477, 31 U. S. C. §203. Section 3477 declares in pertinent part that

> "*All* transfers and assignments made of *any* claims upon the United States * * * shall be absolutely null and void,"

unless made after the allowance of such claim with prescribed formalities. Neither assignments by "operation of law" nor "equitable liens" are within the prohibition of

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[10] Note that the parallel Anti-Assignment Act, 31 U. S. C. §203, has no application where the "assignee" asserts no claim against the United States. *Rosecrans* v. *William S. Lozier, Inc.*, 142 F. (2d) 118, 124 (C. A. 8th).

§3477.[11] A statutory attorney's lien is exempt from §3477 because created by "operation of law". *Brooks* v. *Mandel-Witte*, 54 F. (2d) 992, 995 (C. A. 2d). In the District of Columbia, an attorney who provides for payment exclusively out of the recovery, as in the instant case, obtains a judge-made lien, *Friedman* v. *Harris*, 158 F. (2d) 187, 188 (App. D. C.); *Pink* v. *Farrington*, 92 F. (2d) 465, 466 (App. D. C.), that is to say, a lien by "operation of law."[12] It would be anomalous if a contract that merely articulated the lien provided by "operation of law" would encounter the ban of the Anti-Assignment statute and by the same token of the less sweeping terms of §9(f).[13]

Here as under §3477 it may be said with respect to an attorney's lien agreement that

> "None of the evils which the statutes were intended to prevent could arise from such an agreement. * * *. Such contracts not being otherwise opposed to public policy, it would be an unreasonable construction of statutes intended solely for the protection of the United States to extend them thereto." *Roberts* v. *Consaul*, 24 App. D. C. 551, 559-560.

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[11] *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 374-375. The Court directed attention to the fact that the Assistant General Counsel of the Treasury, "in explaining" another bill, stated:

> "One exception after another has been carved from Section 3477, until now the courts recognize many types of adverse claims as the basis for what in effect are third party suits against the Government, including suits based upon assignments by operation of law, subrogation *and equitable liens*." 338 U. S. at 380.

[12] Judge Learned Hand said:
"it can scarcely be that an equitable assignee [attorney] is in a weaker position than a statutory lienor [attorney] * * *" *Woodbury* v. *Andrew Jergens Co.*, 69 F. (2d) 49, 50 (C. A. 2d)

[13] Compare the rule that the expression of some fact which is necessarily implied in the giving of every bill or note does not render it non-negotiable. *Frank* v. *Wessels*, 64 N. Y. 155, 158; *cf. Wood* v. *Lovett*, 313 U. S. 362, 370.

Conclusion

As the terms "garnishment and attachment" disclose, §9(f) does not apply to the "9(a) court" which has control of the property without resort to those remedies. The purpose of the Act was to supply an exclusive scheme of administration, administrative and judicial, to foreclose interference with either the Custodian or "9(a) court" by any other court. The enforcement by the "9(a) court" of an attorney's lien in the process of administration in no way offends these objects. No useful or statutory purpose is accomplished by destroying the lien of an attorney who represents a §9(a) claimant. On the other hand, the construction adopted below seriously impairs the relief granted to claimants by discouraging contingent representation.

When, in a similar situation, the alien property administrator argued that the court was

> "not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole"

Judge Learned Hand replied that

> "Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute." *Cabell* v. *Markham,* 148 F. (2d) 737, 739 (C. A. 2d).

This Court approved the decision, saying that

> "resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes * * *" *Markham* v. *Cabell,* 326 U. S. 404, 409.

And it approved Judge Hand's refusal

> "to make a fortress out of the dictionary." *Ibid.*

In seeking to weaken the enemy, Congress was at pains to protect the rights of citizens from deprivation resulting

from mistaken or wrongful summary seizures. To this end it provided judicial relief in §9(a). The Act should not be read to vitiate the remedy by making the medium of recovery—contingent retainers—more difficult if not unavailable.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

RAOUL BERGER
Attorney Pro Se

ABE KRASH
Of Counsel